INTERFINANCE BERHAD

v.

LIEW EK CHIU

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[ORIGINATING SUMMONS
NO. KG. 89 OF 1986]
12 APRIL 1993

CONTRACT: Dispute as to principal amount to be used in the computation of interest - Dispute as to period of interest - Dispute as to rate of interest - Whether plaintiff entitled to charge compound interest - Whether plaintiff only entitled to simple interest.

The defendant took a loan from the plaintiff and executed a Memorandum of Charge as security. Upon the defendants default, the plaintiff foreclosed on the property. The questions that arose were:

(1) The principal sum to be used in calculating interest. The defendant contended that allowing the figure quoted by the plaintiff to prevail would mean allowing interest upon interest which is not provided for in the charge. The defendant further relied upon s.11(a) of the Civil Law Act 1956 and s.75 of the Contracts Act 1950 to show that the clauses in the charge allowing the charging of interest upon interest were a penalty and therefore inapplicable;
(2) Whether the period of interest should only be up to the time the order for sale was obtained, on the grounds that the order for sale was a judgment, or whether it should be up to the time the property was successfully auctioned off;
(3) Whether the rate of interest was at 15% p.a. with monthly rests up to the date of the auction as claimed by the plaintiffs or whether it was at 15% p.a. simple interest up to the date of the order for sale and subsequently at 8% p.a. to the date of the auction as asserted by the defendant.

Held:

[1] Section 11 of the Civil Law Act 1956 only applies where there is a judgment on a debt or damages. An order for sale is not a judgment debt and the defendant's reliance upon the said section and upon s.75 of the Contracts Act 1950 was without any merits.

[2] Clauses 1, 4(1) and 35 of the charge continued to govern the relationship of the parties and as clause 35 entitles the plaintiff to capitalize accrued interest, the principal sum as stated by the plaintiff was correct.

[3] The actual realisation of repayment of the loan through the order for sale was only on the auction date and the cut-off point on the liability to pay the stipulated interest should not be on the grant of the order for sale but on the auction date.

[4] The defendant has failed to show that the terms of the charge as to the rate of interest are contrary to any provision of the laws. The defendant agreed to the rate of interest when the transaction was concluded and had already used the loan without making any complaint on the rate of interest or any other provisions of the charge and he could not be heard to say that those terms were unconscionable.

[Orders accordingly].

Cases referred to:

National Bank of Greece SA v. Pinios Shipping Co. No. 1 & Anor. [1990] 1 All ER 78 ***(cit)***

Malaysia International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd. [1988] 1 MLJ 257 / [1988] 1 CLJ 8 ***(refd)***

MBF Finance Bhd. v. Malaysia Air Charter Co. Sdn. Bhd. [1987] 2 MLJ 718 / [1987] 2 CLJ 291 ***(cit)***

Legislation referred to:

Sarawak Land Code (Cap. 81), s. 148(2)(c)
Civil Law Act 1956, s. 11(a)
Contracts Act 1950, s. 75
National Land Code 1965, s. 257

For the plaintiffs - Perpetua Phang; M/s. Reddi & Co.
For the defendant - Ernest Chua; M/s. Ernest Chua & Co.

JUDGMENT

Richard Malanjum JC:

The undisputed facts

The defendant borrowed the sum of RM200,000 from the plaintiffs. To secure the loan a Memorandum of Charge dated 10 February 1983 (hereinafter called "the Charge") was executed between the parties and was subsequently registered at the Kuching Land Registry office on the 7 June 1983 as Instrument No. L.6564/83. The defendant defaulted for not less than 6 instalments in his monthly instalment of RM4,229. Accordingly the plaintiffs by way

of originating summons dated 31 March 1986 applied for an order for sale pursuant to s. 148(2)(c) of the Land Code (Cap. 81). The order for sale was granted on 22 August 1987. However the auction of the charged property was only successful on 23 October 1989. The plaintiffs also based their application on the sum outstanding as of 14 February 1986. Though the date is not in dispute the sum outstanding is. The plaintiffs claim that the sum outstanding as of 14 February 1986 is RM155,626.37 whereas the defendant says that it is RM147,771.68. The plaintiffs also claim for interest at the rate of 15% per annum on monthly rests. However, the difference in the outstanding sum has been removed when learned Counsel for the plaintiffs agrees to the sum of RM147,771.68. The reason for the concession is to save the Court's time as learned Counsel puts it. Such attitude is appreciated by this Court so long as justice is not sacrificed.

The issues

After consultation between themselves learned Counsel for the parties agree that this Court should only consider the following issues, namely:

(i) What is the amount (that is the principal sum) to be used in calculating interest. Is it RM147,771.68 as claimed by plaintiffs or is it RM121,995.30 as alleged by defendant;

(ii) the period of interest - which period - is it from 15 February 1986 to 23 October 1989 as claimed by the plaintiffs or is it from 15 February 1986 to 22 August 1987 as asserted by the defendant;

(iii) the rate of interest, is it 15% p.a. with monthly rest from 15 February 1986 to 23 October 1989 as claimed by the plaintiffs or is it 15% p.a. simple interest from 15 February 1986 to 22 August 1987 as asserted by the defendant and at 8% p.a. from 23 August 1987 to 23 October 1989.

I shall therefore only deal with those issues in this Judgment.

The findings of the Court

(i) *What is the amount (that is the principal sum) to be used in calculating interest. Is it RM147,771.68 as claimed by plaintiffs or is it RM121,995.30 as alleged by defendant:*

It is the contention of learned Counsel for the defendant that the outstanding sum as of 14 February 1986 should only be RM121,995.30 as the sum of RM147,771.68 includes accrued interest and to allow that figure to prevail would mean allowing interest upon interest which is not provided for in the Charge. Learned Counsel further contends that clauses 1(1), 4(1) and 35 of the Charge are not applicable as they amount to a penalty and are therefore illegal. Section 11(a) of the Civil Law Act 1956 and s. 75 of the Contracts Act 1950 are referred to.

In reply learned Counsel for the plaintiffs argues that clause 1(1) read with clauses 4(1) and 35 of the Charge allows interest to be charged upon interest and those clauses are the terms, *inter alia*, which continue to apply between the parties. The case of *National Bank of Greece SA v. Pinios Shipping Co. No. 1 & Anor.* [1990] 1 All ER 78 is cited.

Clause 1(1) of the Charge reads:

> 1 The Chargor(s) will on demand pay to the Chargee:
>
> (1) The said sum of Malaysian Ringgit Two hundred thousand only (RM200,000) (hereinafter referred to as "the Loan" which expression shall include wherever the context so permits any balance or part thereof) together with interest thereon at the rate of Fifteen (15%) per centum per annum with monthly rests (hereinafter referred to as "the Prescribed Rate") which expression shall include where and when applicable such other rate as may from time to time be substituted therefor (in the manner hereinafter provided) And until demand as aforesaid to repay the loan and interest thereon at the Prescribed Rate by 72 instalments at the times and in the manner following that is to say by monthly instalments of Malaysian Ringgit Four thousand two hundred and twenty-nine only (RM4,229) each (hereinafter referred to as the "Instalments") the first of the Instalments to be paid on the same day of the month following next after the date on which the full amount of the Loan shall have been advanced or paid to or on behalf of for the benefit of the Chargor(s) or on such other date as the Chargee may stipulate and the subsequent Instalments to be paid at regular successive intervals of one (1)

month until the full amount of the Loans and all interest thereon shall have been fully paid and satisfied.

Clause 4(1) of the Charge reads:

4.(1) The interest chargeable on any sum advanced or paid to or on behalf of or otherwise howsoever payable by the Chargor(s) to the Chargee under this Charge (whether the same shall form part of the Loan or otherwise) from the date on which the same shall have been advanced or paid or become payable as aforesaid until the full amount of the loan shall have been advanced on paid to or on behalf of or for the benefit of the Chargor(s) shall be calculated on the amount thereof outstanding at the end of every month and shall be deemed to be due forthwith upon such sum being advanced or paid as aforesaid.

Clause 35 of the Charge reads:

35. The Chargee shall have the right to capitalise at its sole discretion any interest or any moneys payable or owing under this Charge if the same remain owing and unpaid after their due dates. The Chargor(s) hereby agree that any amount capitalized under this Charge shall be added for all purposes to the principal sum hereby secured and shall henceforth bear interest at the rate herein provided, to be computed from the date on which the same ought to have been paid and all the covenants and provisions contained in this Charge and all powers and remedies conferred by law or by equity in relation to the said principal sum and the interest thereon shall equally apply to such capitalised arrears and/or interest on such arrears.

I note that learned Counsel for the defendant is not contending that these above clause are no longer effective but says that they are not applicable as being a penalty and illegal on the basis of s. 11(a) of the Civil Law Act 1956 and s. 75 of the Contracts Act 1950.

Section 11(a) of the Civil Law Act 1956 provides:

11. Power of Courts to award interest on debts and damages.

In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section -

(a) shall authorise the giving of interest upon interest;

...

...

Section 75 of the Contracts Act 1950 provides:

75. Compensation for breach of contract where penalty stipulated for.

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation - A stipulation for increase interest from the date of default may be a stipulation by way of penalty ...

On reading s. 11(a) of the Civil Law Act 1956, with respect, I do not think it is relevant in this instant case. I agree with the submission of learned Counsel for the plaintiffs that s. 11 applies to where there is judgment on a debt or damages. The Supreme Court in *Malaysia International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* [1988] 1 MLJ 257 has held, *inter alia*, that an order for sale is not a judgment debt. In that case the appellant had applied for the sale of certain lands belonging to the respondent to satisfy the sum of RM2,219,682.70 due to them. The learned trial Judge made an order for the sale of the charged lands by public auction under s. 257 of the National Land Code to satisfy the sum due, with interest thereon at the rate of 8% per annum from 29 November 1986 to the date of realisation. The appellant appealed against the part of the order directing that interest at 8% be paid by the respondent to the appellant. The respondent cross-appealed against the order for sale made by the High Court. The Supreme Court allowed the appeal and

dismissed the cross-appeal. His Lordship Seah SCJ at page 258 E-F (left) said this:

> Here, there was no judgment debt. The claim of the appellant in the court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant but under the registered charge.

With regard to s. 75 of the Contract Act 1950 I also find no merit in the contention. The issue is on the payment of interest on monthly rests and the capitalisation thereof. There is no question of a named sum payable or an imposition of a penalty upon breach of contract. Perhaps there may be a basis if the defendant is complaining on the imposition of additional interest or overdue charge upon default of instalment as stipulated in clause 6 of the Charge. But this is not the case here and on examining Exhibit LEC-3 (page 2) of the affidavit of the defendant affirmed on the 5 June 1987 and filed herein overdue charge does not arise.

It is therefore my view that clauses 1, 4(1) and 35 of the Charge continue to govern, *inter alia*, the relationship between the parties herein. Accordingly as clause 35 entitles the plaintiffs to capitalize accrued interest it is my finding that the principal sum as of 14 February 1986 should be RM147,771.68. As the accrued interest has been capitalised by the plaintiffs as evident from their claim I do not see how it can be continued to be considered as interest which the defendant appears to be contending.

(ii) *The period of interest - which period - is it from 15 February 1986 to 23 October 1989 as claimed by the plaintiffs or is it from 15 February 1986 to 22 August 1987 as asserted by the defendant:*

The main basis of the contention of the learned Counsel for the defendant on this issue is that an order for sale is a judgment. Learned Counsel therefore concludes that since the order for sale was granted on 22 August 1987 the stipulated interest of 15% per annum should cease on that date. He cites the case of *MBF Finance Bhd. v. Malaysia Air Charter Co. Sdn. Bhd.* [1987] 2 MLJ 718.

On the other hand learned Counsel for the plaintiffs contends that an order for sale is not a judgment and cites *Malaysia International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* (*supra*). Learned Counsel also says that the charged land was only successfully auctioned on 23 October 1989 which would mean that the actual realisation of repayment of the loan through the order for sale was only on that date and not earlier.

I am in agreement with the learned Counsel for the plaintiffs. I do not think the cut-off point on the liability to pay the stipulated interest should be on the grant of the order for sale in this instant case. Besides such order not being a judgment it is also clear in the Charge that the defendant "promise to repay the same in the manner hereinafter appearing and **until payment** to pay interest thereon at the rate and in the manner aftermentioned" (emphasis added). I do not think the *MBF Finance's* cited by learned Counsel for the defendant is relevant in the present case as that case involved the existence of a judgment debt whereas in this case the authority is clear that an order for sale is not a judgment debt.

Further, my view on s. 11 of the Civil Law Act 1956 as stated under issue (i) above also applies on this issue.

Accordingly, the period of interest in my judgment is from 15 February 1986 to 23 October 1989.

(iii) *The rate of interest, is it 15% p.a. with monthly rests from 15 February 1986 to 23 October 1989 as claimed by plaintiffs or is it 15% p.a. simple interest from 15 February 1986 to 22 August 1987 as asserted by the defendant and at 8% p.a. from 23 August 1987 to 23 October 1989.*

In view of my findings on issues (i) and (ii) above it is in my judgment for this issue that the applicable rate of interest is 15% per annum on monthly rests from 15 February 1986 to 23 October 1989. As stated earlier on the order for sale is not a judgment which attracts the application of s. 11(a) of the Civil Law Act 1956. Further, the defendant agreed to the rate of interest when the transaction was concluded and had already used the loan without making any complaint on the rate of interest or for that matter the other provisions of the Charge. As such I find it difficult to hear him saying that those terms are unconscionable unless he can show that the terms are contrary to any provision of the laws in this

country. I do not think the defendant has shown that in this case as discussed earlier on in this judgment.

Conclusions:

Accordingly I order that:

(i) the principal sum to be used in calculating interest is RM147,771.68;
(ii) the period of interest is to run from 15 February 1986 to 23 October 1989; and
(iii) the rate of interest is at 15% per annum on monthly rests.

Learned Counsel for the plaintiffs has also said during the hearing that there is a sum of RM78,675.32 deposited with the HSBC Finance Berhad by the Registrar of the High Court. Learned Counsel therefore applies that in the event of judgment being given in favour of the plaintiffs the said sum plus accrued interest should he paid out without the plaintiffs having to make another application. Having considered the application and as the judgment of this Court is in favour of the plaintiffs I grant the application of the learned Counsel for the plaintiffs and hereby order that the sum of RM78,675.32 together with all accrued interest, less any costs that may be due to the Court, be paid out to the plaintiffs upon the expiry of the appeal period and if there is no appeal.

I also order costs against the defendant to be taxed unless agreed by the parties.

KALWANT KAUR A/P RATTAN SINGH

v.

KEMENTERIAN DALAM NEGERI MALAYSIA & ANOR.

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[ORIGINATING SUMMONS NO. 24-921-91]
15 APRIL 1993

CONSTITUTIONAL LAW: Application for declaration that applicant is entitled to citizenship by operation of law - Whether the requirements of Article 14(1)(a) of Federal Constitution fulfilled.

The applicant who was born in Perak in 1942 applied for confirmation of her citizenship status on 16 November 1990 wherein she was informed that the status of her citizenship could not be confirmed. The applicant sought a declaration that she is a citizen or entitled to citizenship by operation of law relying upon Article 14(1)(a) of the Federal Constitution read together with paragraph 1(1)(a) of Part 1 of the Second Schedule and Article 124(1)(c)(ii) of the Federation of Malaya Agreement 1948 (FMA 1948).

The respondents opposed the application on the grounds that the applicants father was not a Federal citizen as at the date of her birth and relied upon Article 124(1)(f) FMA 1948. The respondents further relied on the fact that the applicant, by using an Indian passport, had deprived herself of the right to be a Federal citizen.

Held:

[1] The plaintiff has satisfied the requirements set out in Article 14(1)(a) of the Federal Constitution read with Article 124(1)(c)(ii) of the FMA. The facts show that as at the date of her birth, the plaintiff was a British subject as her father was a British subject and she was born in one of the territories comprised in the Federation, Perak, and her father was a permanent resident of Perak. The plaintiff is entitled to a declaration that she is a citizen by operation of law.

[2] The plaintiff's status as a Federal citizen was still unascertained and as such the question of the plaintiff depriving herself of citizenship did not arise as yet.

[Plaintiff's application for declarations allowed with costs].